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NEW READINGS OF OLD LAW.

When the principle upon which a law rests is unchanging, unchangeable, then that law has no age; it was never young, it can never grow old. For this reason, only that is old in the law which is changing and changeable—that which is not permanent because not a part of the unaging truth. So if we here speak of “old law” it must be either of that which was ephemeral and has, therefore, passed away, or of that which is unchanging and for that reason should not properly be called old. Yet we must use language as we find it. The law which we are to investigate is “old” in the customary sense of having been set down in old records or in printed pages some centuries ago. But let us not think of it as old in any derogation of its worth; let us merely think of it as “rich with the hoar of time,” and as bearing in its withered shell the live seed of the present law. Sometimes this very “hoar of time” has so covered the law as to give it a semblance of something it is not, and, strange as this may seem, this is what has happened to one of the best known institutions of our law; one of the most valued and most boasted of in all its history. We have gloried in the right to “be tried by our peers”; we have been told that our liberties have been safeguarded, our rights protected, by means of this institution, and then we are also told that this very institution in the course of its eventful history has “suffered a sea change,” and from being a jury which spoke of its own knowledge of the facts of which it was to judge, has come to be a jury whose one virtue is to know nothing of those facts. Are either of these propositions correct?

In the old time the jurors were the witnesses “this doctrine has in our own days become a commonplace. For the purpose of popular exposition it is true enough. Nevertheless it does not quite hit the truth.”¹ As a rule we may rely upon the authors just cited to know whether a proposition hits the truth or not. In the case of the jury, however, they have never given us what

¹ Pollock & Maitland, *History of English Law* (2d Ed.), Vol. 2, p. 622.

would have been of immense value—a connected statement as to the real functions or the true development of the jury. At first reading one may almost think that they are on the side of those who hold that the earliest jury was a very different thing from the jury of today, and that they are to be counted upon the side of those who look upon the jury of that day merely as sworn witnesses who spoke from their own knowledge and their own knowledge only, and who did not, as do our jurors today, have before them the testimony of other witnesses and the knowledge to be gathered from persons who have really a first hand knowledge of the facts about which they speak, as many of the jurors do not.² But after gathering such quotations as that just cited from the four corners of their history it becomes plain that Mr. Pollock and Mr. Maitland saw and acknowledged the fact that the jurors of that period did depend on testimony; did not speak their judgment from their own knowledge simply. When one gives a serious attention to the great writers on legal history it becomes a surprise that this false theory ever grew up at all, for they are free to state their own thoughts that the jurors “took testimony.” Mr. Luke Owen Pike, writing in 1885, says, “But their testimony must commonly have been very much of the nature of hearsay evidence. They were not supposed to speak necessarily from their own knowledge, ‘*de leur ascient*,’ as the jurors of the assize were, but *ex credulitate*.”³

Mr. Thayer says:⁴ “Always, as we see, there had been, in some cases, a mingling of the jury with witnesses in their private deliberations.” Mr. Thayer, like many others, felt that somehow the change had been great from the old process to the new. “How and when did this great change of introducing witnesses to testify publicly to the jury come about? No one as yet can tell with exactness.”⁵ The strange thing is that with the history of the law being spread out before them by means

² Pollock & Maitland, *Hist. of Eng. Law* (2d Ed.), Vol. 2, p. 626.

³ Y. B. 12-13, Edw. III, Preface, p. lvi.

⁴ Thayer, *Evidence*, p. 122.

⁵ Thayer, *Evidence*, p. 123.

of their own indefatigable labors, men like Mr. Thayer should feel that here was still a great mystery. He goes on to say, "There was certainly one sort of trial in which witnesses were publicly examined before the jurors at an early period."⁶ He cites a Year Book case of 1371-75 in which the persons challenged were sworn to give evidence to the jurors.⁷ But he does not give us any close examination of the still earlier cases which are of the most interest to us, if we are to learn what really happened in the beginning of the life of the jury. We must get back to the first cases in which we do find witnesses coming in to testify. All our authors concede—if concede is the word, since they were only anxious for the truth—that witnesses are combined with the jury to prove deeds at a very early period, "From the beginning of our records," Thayer says:⁸ He cites Glanvill for this. "*In posteriore vero casu, poterit in curia carta ipsa per aliquem idoneum testem.*" Evidently not only those subscribing to the charter, as is sometimes said, but any "proper witness." There seems little need to cite cases where such deeds are brought forth as evidence, with the subscribing witnesses thereto. For example, the whole *Placita Quo Warranto*, is full of them.⁹ On page three of this book will be found the case of the "*Abbaressee de Fonte Eboraudi*," where there are many questions asked and a witness is introduced, "*Et hoc idem testatem est per Thom' de Brahy.*" This plea was held in 1285-86. And so all through these cases; everywhere the charter is brought in as evidence and frequently the witnesses to confirm it. We have even earlier cases from Bracton's Note Book, that mine of treasure for the old law. Witnesses who were named in a charter are produced in a case in 1224.¹⁰ In 1227 four witnesses also named in the charter testified upon their oath that they were present when the charter was made, but as to the other charter which was produced they knew noth-

⁶ *Ib.*, p. 123.

⁷ *Ib.*, p. 124.

⁸ Thayer, Evidence, p. 97; Glanvill, Lib. X, C. 12.

⁹ *Placita de Quo Warranto*, Temp., Edw. I, II, III (Rec. Com. 1818).

¹⁰ Bracton, Note Book, 222.

ing.¹¹ In the same year the litigants rest their case upon the two witnesses in a charter. The report of the case ends with the citation of the witnesses to appear.¹² There is an interesting case in 1231, in which the proceedings are very modern, and a number of witnesses give their testimony.¹³

In the *Placita Corone de Comitatu Gloucestric*, for the fifth year of the reign of King Henry the Third (1221) we find Maitland saying that while the jurors had "sometimes really seen the crime, more often their knowledge must have been inferential."¹⁴ "Occasionally other persons who are not jurors give evidence."¹⁵ For instance Maitland cites the case of John Spirewin, who killed Peter the son of Walter with a knife while they were playing "*ad talos*," and, being taken, Richard the forester, bailiff of the king, said that the two were playing together, and "a discord arose between them" so that Peter was killed. Plainly a witness and a good one.¹⁶ In the next case cited the Comes Marascallus is present and testifies that the accused was absent at the time of the murder, being in "*exercitu Lodowicy apud Londomiam*." So he gives pledges to appear to hear judgment at Westminster.¹⁷ In another case of murder, five men, whose names are given "*et pluries alii*" who were present at the time of the murder give their testimony, and the four vills testify to the facts also. After all this the jurors say that the accused is guilty "*et ideo suspendatur*."¹⁸ In the case of Roger the Franklin,¹⁹ the coroners, the twelve jurors and the four vills "*omnes una voce dicunt*" that the accused is guilty. The case of Richard the Butler, one is tempted to transcribe as a whole since it is almost a complete romance in itself. Here the accused—a woman—is questioned and speaks for herself. Mr. Maitland at

¹¹ *Ib.*, 250.

¹² *Ib.*, 255.

¹³ *Ib.*, 592.

¹⁴ Maitland, Introduction, p. xli.

¹⁵ *Ib.*, p. xli.

¹⁶ *Ib.*, Case 189.

¹⁷ *Ib.*, Case 254.

¹⁸ *Ib.*, Case 394.

¹⁹ *Ib.*, Case 414.

that time seemed to regard this as unusual. In later years he would surely not have done so, for we have innumerable cases in which the accused tells his story briefly or at length as the case may be. The jurors think that she purchased the death of her husband, but suspend judgment for a month.^{19a} One may be allowed to suspect that more evidence was desired. It is in the introduction to this very volume of the *Please of the Crown* for the County of Gloucester, that Mr. Maitland formulates the theory that the four villis mentioned above were the germ of the present jury system. Later ²⁰ he seems to repudiate this view, but in writing on the jury and the taking of testimony before it, Mr. Maitland is always writing with other thoughts in his mind; he is working out a theory of evidence; of the origin of the jury; of the specific pleas of which he is treating; he never took up the specific subject of the development of the jury, but whenever he touched upon it he had illuminating ideas. These four villis interested him as they have interested many. They are the community witnesses who have also been considered as the germ of the jury: probably with very much truth, but that is not now our precise object. They interest us here chiefly as they lead up to what seems to be a fundamental error in the treatment of the jury by the historical writers upon it. From it appears to grow the confusion created by the phrase "the country." Maitland remarked it, but appears unconscious that he did so. In speaking of a verdict of a "*pays*" a country, a community, a neighborhood, he says "we may perceive what we may not handle," which is pre-eminently what genius does; those who come after may do the handling. He gives us the clue which we may follow. "The voice of the twelve men is deemed to be the voice of the countryside, often the voice of some hundred or other district which is more than a district, which is a community." This is just what it was—not its own voice, the voice of the *jurata*. It was the voice of the four villis; of the neighborhood. When people appealed to the "*pays*" they did not

^{19a} *Ib.*, Case III.

²⁰ P. & M. Hist. of Eng. Law, Vol. 2, p. 649, n. 4.

mean as most of us have been taught, that they appealed to the jury; not at first at all events—not for a long time, not until the phrase had crystallized through long custom and representation had had to take the place of the entire country. They really meant what they said when they appealed to the country. They “put themselves” on the country which knew them; which knew the facts. At first it may have been literally the whole country; that is the whole neighborhood which came to testify before the twelve; there is a theory that this is so.²¹ And we shall see that there are cases reported in which the “whole country” testifies. We are not absolutely sure, of course, that this must be taken to mean literally all the neighbors; it may mean that a large number sent by the countryside so testified. But it apparently means that the people who could get to the court and who knew anything about the case went before the jurors and told what they knew. These people, or these four vills, do not always testify to the same thing; they do not speak in concert; frequently one says one thing, another another thing. Sometimes one will know a good deal and say so; the second will know nothing; the third will add some facts to the knowledge of the first, or differ in regard to them. It is all the voice of the countryside; its own voice as a whole, or speaking through the voice of those whom they have sent to speak for them. They tell the jurors what they know; the jurors should know also of their own knowledge, if they can, but many times the knowledge is impossible for them at first hand. “The twelve representatives of the country will certainly not be able to answer if they may speak only of what they have seen with their own eyes.”²² For example Maitland gives case 628 in the Note Book, “*Et Ricardus venit et dicit quod omni tempore a conquestu Anglie ibi communam habuit . . . et inde ponit se super patriam.*” The thoughts of the jury must have been long, long, thoughts if they could go back from 1231 to 1066, of their own memory! According to Glanvill the recognitors of the grand assize may base their ver-

²¹ 17 L. J. 452 (1862).

²² P. & M. Hist. of Eng. Law, Vol. 2, p. 624.

dict upon what their fathers have told them, but jurors (in the narrower sense) should speak "*de proprio visu et auditu*."²³ The phrase is in Glanvill, "*de qui probare possunt de viso suo proprio et auditu*," but their "own sight and hearing" is not necessarily the sight and hearing of the jurors themselves; that is simply read into the phrase by our accustomed thought. Those who by their own sight and hearing can prove anything are most often not the jurors, but those who can inform the jurors—the "*pays*" upon which the people rely as Twiss' translation of Bracton puts it "upon the testimony and proof of those, who can prove by their own sight and hearing."²⁴ "Some of the verdicts that are given must be founded upon hearsay and floating tradition."²⁵

When writing about the "sworn inquest" and the early history of the trial by jury (in regard to its origin chiefly), Pollock and Maitland say, "a jury is not summoned until the litigants in their pleadings have agreed to take the testimony of 'the country' about some matter of fact."²⁶ People did not go to the country unless they agreed to do so. Indeed, the man who knew he was guilty generally refused this procedure. His only course then was to abjure the realm. In reading these cases one feels that the roads to the seaports must have been filled with these people who could not trust a verdict of their neighbors as to their deeds. They often wander out of the straight road; the Year Books of a later period—for all this is back of Year Book law—will often tell of their being brought back and apprehended. Such a man knew that if the sworn twelve did not know all about him of their own knowledge all the countryside will be eager to give them all the knowledge in their possession; when the jury give their verdict they will know all the facts so far as he has not been able to conceal them. After a while if he feels that he will be allowed to come back he sues for a pardon from the king, and if he can pay well for it, gets it, and

²³ Bracton, f. 317, b.

²⁴ Twiss' Trans. of Bracton, Vol. 5, p. 3.

²⁵ P. & M. Hist. of Eng. Law, Vol. 2, p. 624. See also note 4.

²⁶ P. & M. Hist. of Eng. Law, Vol. 1, p. 149.

resumes life in the old place once more. Sometimes the history of this pardon shows the supposed malefactor in a very different light from that in which he is at first presented.²⁷ It is curious to see, in this case, how difficult it is to convince the jurors that the accused was actually pardoned. It was a time when the valuable "charters of pardon" were very frequently forged.

The Pleas of the Crown²⁸ show us many instances of witnesses coming before the jury. One case shows the coroner and the whole country testifying before the jurors.²⁹ This is in 1202. Another case in the same year shows the sheriff and the whole county testifying.³⁰ A later case, 1221, makes all the jurors, both of the town and the hundred, say that the accused is not guilty, and the county records are used as evidence.³¹ In a case in 1225 the "knights of this hundred and those of Taunton Hundred, and others and the townships come and say upon their oaths that they suspect these men, and indeed the whole township [of Sampford] except four men, to wit, Richard of the Wood, William Breckeherte, Stephen Reeve, the elder, Warin the Tailor, and Richard One-eye, say precisely that when they were pursuing their lord to slay him, he fled to the church and would have entered it, but the chaplain shut the door, and he dared not enter, and then they slew him and put him in his house and set fire to it." This is all sworn testimony before the jurors, after all of the accused have put themselves upon the country.³² Another case of the same year differs from the cases already cited because the accused produce a "whole tithing" as witnesses who give their testimony to the jurors.³³ A case in 1220 should not perhaps be considered as it is not the ordinary procedure before a jury, but it is very interesting, as it shows more clearly than any of the others the method of taking the testi-

²⁷ Pleas of the Crown for the County of Gloucester, Case 362.

²⁸ Selden Soc., Vol. 1.

²⁹ Pleas of the Crown, Sel. Soc., Vol. 1, Case 23.

³⁰ *Ib.*, Case 40.

³¹ *Ib.*, Case 162.

³² *Ib.*, Case 179.

³³ *Ib.*, Case 184.

mony of the witnesses. Eight men of Waltham, how chosen we do not know, are sworn and testify to the truth, "as they believe, for all the countryside say so." "The men of Cheshunt" (the number is not given, but we may assume eight), do not know what the men of Waltham know, but testify, being sworn, to another set of facts. The eight men of Wormley, being sworn, know still other things. The eight men of Enfield, "well believe"—certain facts, "for all men say so." We have the four villis here represented by eight men each, and they all give sworn testimony as to the facts: as complete a body of evidence as could be desired save for the element of hearsay, which is not so much hearsay as cumulative evidence, as it is evident that they have given great attention to getting at all the facts in the case.⁸⁴ Glanvill cites this case, as the case of Elias Pigon, and says that it came before Martin Pateshull.⁸⁵ From the manner of its recording and the citation by Glanvill it was probably thought an important case.

In a Cornish Eyre of 1201,⁸⁶ "The jurors being asked, say they suspect him of it; the whole country likewise suspect him." In case 6,⁸⁷ the four neighboring townships which are sworn, suspect two men of burglary. We should note that in this and many other cases the testimony is sworn testimony, for it is generally stated that such evidence was given without the formality of an oath.⁸⁸ In other cases the coroners and the whole country testify,⁸⁹ "Those who are sent by the sheriff,"⁹⁰ "And the jury and the whole neighborhood suspect him of that death."⁹¹ "Afterwards it was testified by others" (than the jury) "that R. slew her."⁹² In another case the jurors say the

⁸⁴ *Ib.*, Case 192.

⁸⁵ Glanvill, f. 151, b. Also P. & M. Hist. of Eng. Law, Vol. 2, p. 638.

⁸⁶ Sel. Soc., Pleas of the Crown, Case 1.

⁸⁷ Page 3.

⁸⁸ P. & M. Hist. of Eng. Law, Vol. 2, p. 542.

⁸⁹ Pleas of the Crown, Sel. Soc., Vol. 1, Case 23.

⁹⁰ *Ib.*, Case 45.

⁹¹ *Ib.*, Case 68.

⁹² *Ib.*, Case 127.

accused is guilty, but the four townships "know naught of him but good."⁴³ There is a difference of opinion in the next case,⁴⁴ and the townships do not agree at first; at length all agreed that all the accused were guilty.

In a case in 1225⁴⁵ the king's baliff testifies that the accused confessed the deed, before him and before many others, and he produced a whole tithing which testified the same. The accused testifies for himself (this is another case in which the accused is a witness for himself) and accuses another man of the murder. But the twelve jurors decide that the accused is guilty and "say so in so many words," (*"precisé dicunt"*).

In Bracton's Note Book we find a case⁴⁶ in which the jury and the four villis come, but the accused will not put himself on the country, but all the country and the neighborhood testify, "*quod latro est.*"

It seems unnecessary to go on citing cases which are only examples taken here and there from among the many on record. Much more work must be done, of course, to clear up the procedure, to show just how the four villis, or later their representatives, came to testify. Various theories are already propounded; the community witness and the interesting history which is to be written about him; the coroner's witness, whom Mr. Gross⁴⁷ thinks may be the forerunner of the later witnesses before juries. But to go into that part of the story is indeed another matter involving the entire history of the jury, and perhaps bringing up again the controversy, as yet unsettled, as to the origin of the jury and of its Anglo-Saxon or Frankish birth. In this very inadequate sketch all we are trying to do is to show that the earliest juries of which we have records were not the sole witnesses as to the facts; that although they may have been witnesses they also heard other witnesses; took testimony—

⁴³ *Ib.*, Case 162.

⁴⁴ *Ib.*, Case 163.

⁴⁵ *Ib.*, Case 184.

⁴⁶ Brac. N. B., Case 136.

⁴⁷ Introduction to the Coroner's Rolls, Sel. Soc., Vol. 9; p. xxxiv.

sworn testimony—and also were expected to learn from documents and the recollections of those whose memories could supplement their own.

But, it is always said, the jurors were expected to know of their own knowledge, even if they supplemented that knowledge by that of community and individual witnesses, “other than the jury.” And it is assumed at the same time that the jury of today do not do this; they are selected only because they know nothing of what has occurred, and the less they know of the facts the better.

Again, is this so? The early jury came from the vicinage. Why? Because those of the vicinage knew what had been going on. Exactly. The jury of today, comes as well from the vicinage. Why? Is it wholly a matter of custom? Have no new laws been made as to juries? Are we still on all points subject to the old custom? Then why retain this custom, except for the fact that men or women should be tried by those who know them, or if not near enough for personal knowledge, know the circumstances under which they live; know why a thing would be a provocation, or a temptation here, and not there, under one set of circumstances and not under another. The four villis of our early period must have been farther from each other than any place in a county can be from any other place in a county today. Not because distances were different but because means of communication, and means of disseminating knowledge have grown so enormously that we are better aware of facts and circumstances five hundred miles away today than those of that distant day were aware of what was going on five miles away. It may seem easy to concede this, because after all the real difference is in the fact that the juror of today must be at all points free of suspicion of any partiality; he must be absolutely free from all bias or he can be challenged and refused by the accused or by either party. But in those old days this is also absolutely true. The juror must not be “suspicious,” he must be one who would give his testimony absolutely without bias. This is shown by both the cases and by the statute, which says that

sheriffs and bailiffs shall "*mittent en teles enquests jures le plus prochains le plus suffisants, et meynes suspecenous.*"⁴⁸

See also Coke, "Every juror must have two mosts, and one least, *viz.*: most neere, most sufficient, and least suspicious."⁴⁹

This shows that the jurors, witnesses though they might be, were expected to be impartial witnesses; they must be chosen from those of the vicinage who could be relied on to really "try" the case and give a verdict in accordance with the facts as they and their neighbors knew them. Is not that practically the jury of today? But it is said that the jury of today are not witnesses; they cannot be called to testify in any case, therefore there is certainly one very important way in which the modern jury is unlike the old jury; somewhere and sometime there must have been a period of departure from the old ways when this very great change from a jury which were witness to a jury which under no circumstances are witnesses came about. But is it true that the juror of today can never be a witness and never is a witness? The answer, of course, of anyone who has ever taken the pains to examine into the question, must be that it is not true; that the original character of the juror has not even in this respect undergone that wonderful change which is so frequently referred to. He has not lost this early prerogative, and there is no known time in which he has not been allowed to testify as to facts within his knowledge; indeed he must "submit to be publicly sworn and examined." This entire passage from the note by Mr. Wharton had best be given here. "A juror on trial, who has knowledge of any material facts, must give notice, so that he may be sworn and examined, and cross-examined . . . each juryman may apply to the subject before him that general knowledge which any man may be supposed to have, yet if he be personally acquainted with any material particular fact, he is not permitted to mention the circumstances privately to his fellows, but he must submit to be publicly sworn and ex-

⁴⁸ *Articuli Super Chartas*, 28 Ed. 1, Stat. 3, c. ix.

⁴⁹ Coke Second Institute, p. 561. Note to cap. ix, *Articuli Super Chartas*, par. 4.

amined.”⁵⁰ “Though the jury may use their general knowledge on the subject of any question before them, yet, if any juror has a particular knowledge as to which he can testify, he must be sworn as a witness.”⁵¹ “Let it be distinctly said that jurors are not incompetent witnesses in either criminal or civil issues. They have no interest that disqualifies, and there is no rule of public policy that excludes them. . . . He, like all other witnesses, must ‘confront’ the accused, that is, be examined in the presence of the accused, and be subject to cross-examination; but he is not disqualified to be a witness.”⁵² “It has always been regarded as proper that a juror having any relevant knowledge should be called as a witness, returning to the box after completing his testimony.”⁵³ This principle has been embodied in many of the codes of the states, for convenience of reference it may be as well to refer to the examples cited by Mr. Wigmore in his treatise on evidence.⁵⁴ These authorities are merely given because, as before stated, there seems to be a general vague way of referring to the jury as having entirely lost their original character of witnesses. On this point the chief changes seems to be that they could in the early days collect testimony wherever they found it; while today the custom is to have the testimony all sworn to before the jury. The real difference seems small since the valuable testimony, as I think has been shown, was always sworn to, as it is now, and it cannot be assumed that a juror coming from a county in which the action took place is likely to know less of a case today, when the reading of newspapers is so general, than in the past when every fact had to be communicated by passing from mouth to mouth. The sort of knowledge that he must not have now, and that he was forbidden to have then, was and is the sort that prejudices and prejudged the case in the juror’s mind.

In what way then—what radical way, is the jury of today

⁵⁰ Wharton: Evidence, (3d Ed.), 1888, Vol. 1, Sec. 602.

⁵¹ Greenleaf: Evidence, (16th Ed.), 1899, Vol. 1, p. 395, Sec. 254, c.

⁵² Houser v. Com., 51 Pa. 332 (338), 1865, Woodward, C. J.

⁵³ Wigmore: Evidence, Vol. 3, Sec. 1910, and cases cited in note.

⁵⁴ *Ib.*, Vol. 3, Sec. 1800.

so different from that original jury, (or the very early jury, since we may not as yet get back to the original), that, which sat in the eleven hundreds, in the twelve hundreds and the later juries of the Year Books? We have not touched upon these latter records because they are too near our own times, and there is not time and space to cite the many interesting cases to be found in them. The great and subtile change, if there were one, came earlier than those records, old as they are. If we find these earlier records show us a jury which are judges of the facts, as they are now, if they hear witnesses, sworn to tell the truth, as they do now; if their verdict was a verdict upon the facts as known to them and as testified to them by witnesses, where is the radical difference between the juror of old and the juror of today? There are differences, it is true, subtile differences, but these it would seem after examining the cases, are those of time and place rather than of principle. The vicinage of that day and of this must mean something different since we have annihilated both time and space in many ways; we have brought men together and made them neighbors when they would have been "foreigners" in those days. We learn to know a neighborhood's mind at the breakfast table, better than the man of the twelve hundreds could know that mind in a week's time. But these are only mechanical, superficial changes. The intention in selecting a jury is the same; to get the judgment of a man's neighbors, those who can know best about him, and who know best the circumstances surrounding the special facts, and yet who are "unsuspected" of any bias, who will say truly what they think and who are free to think straight about them. They will proceed to acquire what knowledge they can get from sworn witnesses, but they can also as they did then, rely upon their general knowledge. And after all this they are asked to "say precisely" what they have found. This precise saying of the old jury is the guilty or not guilty of today. Or, if it is a civil case, the jury would say then as now that the horse or the cart, or the house or the charter, belonged to one or the other, or that one should do this or that justice to the other.

Since no man has as yet put his finger on the time of change,

or the method of change, or even knows exactly what the change was or is, why not look through this vague mist of minor differences, and so looking, find that it is but mirage after all? Or, brush away this dust that has gathered over these old records and by so doing read clearly that which has been dimly perceived.

Of what importance is this difference? It vindicates the place of the jury in our law; it shows what it did for man in the old days—what it really did, not what we who think we have been reading the history of the law have come to think it did. It sets aside the criticism of the jury of the past as no real jury, merely a set of men who said what they were asked to say and had not much choice in the saying; it shows that they were judges as they are today, and not merely witnesses; it shows that the familiar taunt that the jury of today is expected to be utterly senseless, because it is expected to be “unsuspected” of malice or bias, is not a thing grown up out of a decadent state of the country or the decay of the jury, but is an integral part of the jury duty, made a mock of by the incompetence or design of the modern lawyer in some cases, perhaps, but a perfectly reasonable and honorably ancient rule for the good of the community. It shows that the idea that this ancient institution of ours is not an ancient institution since it is no true descendant of the old jury, is not true; that this modern jury of ours is no inverted or perverted growth from some thing that was vastly different, whether better or worse, than that which we now have. It might show much more if there were time here to trace it out; it will show much more when carefully examined. From its history may be read the origin and growth of the mutual distrust of judge and jury; of the feeling of the judges that the jury with their “lay minds” cannot be trusted with the judgment of facts which such minds are too low to comprehend. Of the feeling of the juror that the justices are not nearly “lay” enough to understand the mind of the average individual, which he yet does not feel is so low as the justice may think. In tracing this very interesting history we get at the very life of the common law; the thing that has made it more human, and therefore more

just than any other system of known law. That is, that it is in, of, and by, the common people; they are here making their own law; judging their own people; trying to do justice; refusing to suspect without reason, refusing to release or convict, to suspect or to free, except at the demands of their conscience or their common sense. And upon the decisions of these men of the countryside rests the foundations of our law today. One can see it growing up out of them, simple as they are. Soon a statute grows up out of these decisions and another statute, and by and by the great tide of case law rises from these little springs in the hillsides and the valleys of a little country; a little land disciplined by a conqueror of some harshness, who had followed upon conquerors of great harshness; a very much disciplined land, and therefore one better able to come simply to great ideas and customs than in its later days of less self discipline. We have become heirs of the earlier and simpler country, and we here today enjoy the heritage of that simple custom of trying a man or a case by the decision of the countryside. It was a great custom, and one which has suffered, as it seems, but little change from those early and simple days to these. The lesson seems easy enough. Let us keep the good that has come down to us unchanged for so many centuries until the teaching of later centuries finds a deeper truth for which to exchange it.

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